

# Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to Compensate Slavery and (Native) Genocide

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## Abstract

The article scrutinises recent reparation claims by the Caribbean Community and Common Market (CARICOM) against European States to compensate for slavery and (native) genocide. An analysis of Caribbean

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States' actions and strategy so far reveals, that their claim does not focus on making good for the past but on addressing today's socio-economic problems and inequalities. The article then elaborates on the soundness of CARICOM's legal arguments. As the intertemporal principle generally prohibits retroactive application of today's international rules, the paper argues, that the complete claim must be based on the law of state responsibility governing in the time of the respective conduct. This leads to numerous legal obstacles both related to primary as well as to secondary rules of State responsibility. The author concludes that the CARICOM claim is legally flawed but is nevertheless worth attention as it once again exposes imperial and colonial injustices of the past and their legitimisation by historical international law and international/natural lawyers.

## I. Introduction

In 1838, the British State paid £ 20 million to the last (official) British slave owners as a compensation for "expropriation" of those enslaved due to the abolition of slavery in the British Empire and in particular in the British Caribbean. The amount of compensation made up for around 40 per cent of the government's expenditures in that year, today it would equate to almost £ 200 billion.<sup>1</sup> At the same time, the formerly enslaved got nothing, except the (formal) freedom which they should have enjoyed from the beginning. Today, those enslaved have passed away and cannot receive anything anymore. Yet, Caribbean States organised in CARICOM, have taken up their cause and bring forward reparation claims for slavery and (native) genocide against several European States.

Such historical claims are of course familiar to the international lawyer. Only recently, two long standing claims, the Herero claim against Germany<sup>2</sup> and the claim by so called "comfort women" against Japan<sup>3</sup> led to in-

<sup>1</sup> *N. Draper*, *The Price of Emancipation: Slave-Ownership, Compensation and British Society at the End of Slavery*, 2013, 107 et seq.

<sup>2</sup> In 2015 the German government and other German officials (after years of negotiations and pressure by civil society groups) began to qualify massacres against the Herero as genocide and war crimes. Nevertheless, the German government repeatedly stressed that no legal consequences will result from this qualification, instead a political dialogue is sought with Namibia. See for more details below Section III. 1. b); see on recent developments: *A. Buser*, *German Genocide in Namibia before U.S. Courts*, *Völkerrechtsblog*, 11.1.2017, <<https://voelkerrechtsblog.org>>.

<sup>3</sup> According to media reports there has been an agreement between Japan and South Korea that includes the offering of an apology and a special fund to compensate victims still alive. Unfortunately, negotiations became stalled in early 2016.

tense negotiations among affected States and to some progress in the dissolution of those disputes. Still, there is no clear or uniform approach by States how to answer such historical claims. While some historical injustices<sup>4</sup> have been addressed by States with reparation schemes,<sup>5</sup> many historical injustices and especially colonial and imperial injustices have not been adequately addressed. Especially the Trans-Atlantic Slave Trade and slavery on the American continent provoked and still provoke many claims for reparations, albeit with no or only minor success so far.<sup>6</sup>

What is of particular interest with regard to the CARICOM case is that it is not only about making good for the past but also about addressing today's economic inequalities. As CARICOM Heads of States stress that slavery and genocide have contributed significantly to today's underdevelopment of the region, their claim is explicitly linked to development issues and questions of global distributive justice.<sup>7</sup> Two rather old but still crucial questions recur here: Is there a legal obligation by former colonial states to help their former colonies to "develop" and overcome socio-economic

<sup>4</sup> The term historical injustices will be used loosely within this text to describe acts that date back at least several decades and are considered as morally and legally wrong today, although they often were substantively permissible at the time of their conduct.

<sup>5</sup> Examples include payments by Germany to Israel for the resettlement of Jewish people, by the United States of America (US) to (some) Native Americans, by the US to Japanese Americans interned during World War II, by the UK to the Mau Mau, and the controversial reparations paid or promised to be paid by Italy to Libya according to the 2008 Treaty of Friendship, Partnership and Cooperation between Italy and Libya, Benghazi, 30.8.2008, annexed to the Italian Law of ratification (No. 7 of 6.2.2009); for an overview of reparatory programs for historical injustices, see *E. A. Posner/A. Vermeule*, Reparations for Slavery and Other Historical Injustices, *Colum. L. Rev.* 103 (2003), 696 et seq.

<sup>6</sup> On claims for reparations in the US, see *R. Robinson*, The Debt: What America Owes to Blacks, 2001; on claims by African States, see *A. Gifford*, The Legal Basis of the Claim for Reparations, A Paper Presented to the First Pan-African Congress on Reparations, Abuja, Federal Republic of Nigeria, 27.-29.4.1993, available at <<http://www.shaka.mistral.co.uk>>; generally on the topic: *M. du Plessis*, Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery, HRQ 25 (2003); *P. M. Muhammad*, The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law, *Am. U. Int'l L. Rev.* 19 (2004).

<sup>7</sup> See on global justice issues from an international law perspective: *T. M. Franck*, Fairness in International Law and Institutions, 1995; *F. J. Garcia*, Global Justice and International Economic Law: Three Takes, 2013; *E. Tourme-Jouannet*, What Is a Fair International Society?: International Law Between Development and Recognition, 2013; *J. Linarelli* (ed.), Research Handbook on Global Justice and International Economic Law, 2013; *C. Carmody/F. J. Garcia/J. Linarelli*, Global Justice and International Economic Law: Opportunities and Prospects, 2012; *S. R. Ratner*, The Thin Justice of International Law: A Moral Reckoning of the Law of Nations, 2015; out of the numerous philosophical accounts see only (with a special focus on reparations for historical injustice): *D. Butt*, Rectifying International Injustice: Principles of Compensation and Restitution Between Nations, 2009.

problems (partly) related to historical injustices? And, can “the post-colonial world deploy, for its own purposes, the law which had enabled its suppression in the first place?”<sup>8</sup>

Those questions will be addressed in the following article first by highlighting the connection the CARICOM claim draws between historical injustices and today’s development problems, and second by discussing the main legal obstacles to the reparation claim, as CARICOM’s strategy success ultimately depends on the soundness of their (legal) arguments. The third and last part of this article will shortly present some moral and political notions of the claim and highlight the repercussions of historical imperial injustices legitimised by international law for today’s international law discourse.

## II. The Caribbean Reparation Claim in Context

### 1. Historical Injustices at the UN World Conference on Racism

CARICOMs recent reparation campaign started in 2013, but reparatory claims were already brought forward by Caribbean States earlier at the United Nations (UN) World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (UN World Conference on Racism) which took place in August of 2001 in Durban, South Africa.<sup>9</sup>

Interestingly the African as well as the Asian preparatory conference for the Durban World Conference issued supportive declarations for the reparatory movement.<sup>10</sup> Yet, due to the strong opposition not only by Western

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<sup>8</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, 2005, 8.

<sup>9</sup> Theme 4 of the conference’s agenda included “effective remedies, recourses, redress, [compensatory] and other measures at the national, regional and international levels”, for further details see M. Bossuyt/S. Vandeginste, *The Issue of Reparation for Slavery and Colonialism and the Durban World Conference against Racism*, HRLJ 22 (2001).

<sup>10</sup> The Report of the Regional Conference for Africa (Dakar, 22.-24.1.2001), UN Document A/CONF.189/PC.2/8, para. 20, stated, that “States which pursued racist policies or acts of racial discrimination such as slavery and colonialism should assume their moral, economic, political and legal responsibilities within their national jurisdiction and before other appropriate international mechanisms or jurisdictions and provide adequate reparation to those communities and individuals who, individually or collectively, were victims of such racist policies or acts, regardless of when or by whom they were committed”; the Asian Preparatory Meeting’s report urged States to provide reparations for “alien domination or foreign occupation, slavery, the slave trade and ethnic cleansing [...] to those States, communities and individuals who were victims of such policies or practices, regardless of when they were committed”,

and European Union groups but also by the presidents of Senegal and Nigeria, the Caribbean delegates had to leave the main conference without achieving any outcomes in their favour.<sup>11</sup> The final declaration then stated that “slavery and the slave trade are a crime against humanity and should always have been so”,<sup>12</sup> implying that historical slavery and the slave trade carried out by European powers were not illegal at the time of their conduct. Although reparation activists like *Beckles*, who was also spokesman for the Grouping of Caribbean Delegations at the UN World Conference on Racism, took this as a hard setback,<sup>13</sup> it should be highlighted that the final declaration also includes positive outcomes for their cause. Most importantly it acknowledges that

“these historical injustices [slavery, the slave trade and other racist practices] have undeniably contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, in particular in developing countries.”<sup>14</sup>

Thereby drawing a direct link between today’s socio-economic problems in the Global South and historical injustices. Moreover, it has to be noted that several additional statements were issued by and in the name of more than 50 States which kept with the *opinio juris* that slavery, the slave trade and certain aspects of colonialism were crimes against humanity.<sup>15</sup>

On the whole, the UN Conferences on Racism<sup>16</sup> brought some clarity and unity with regard to today’s negative consequences of certain historical injustices, but they also revealed several long-standing conflicts among the international community and an unwillingness to agree on ways to remedy historical wrongs.<sup>17</sup>

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Report of the Asian Preparatory Meeting (Tehran, 19.-21.2.2001), UN-Document A/CONF.189/PC.2/9, para. 50.

<sup>11</sup> *H. Beckles*, *Britain’s Black Debt: Reparations for Caribbean Slavery and Native Genocide*, 2013, 172.

<sup>12</sup> UN World Conference against Racism, Final Declaration, Durban South Africa, 8.9.2001, UN Document A/CONF.189/12, para. 13.

<sup>13</sup> *H. Beckles* (note 11), 172 et seq.

<sup>14</sup> UN World Conference against Racism, Final Declaration (note 12), para. 158.

<sup>15</sup> See the statement by the representative of Barbados on behalf of the Caribbean States, UN World Conference against Racism, Final Declaration (note 12), Chapter VII, para. 13; see also the statement made by the representative of Kenya on behalf of the Group of African States, UN World Conference against Racism, Final Declaration (note 12), Chapter VIII, para. 2.

<sup>16</sup> The review conference in Geneva in 2009 brought nothing new about reparations for historical injustices.

<sup>17</sup> See also: *E. Tourme-Jouannet* (note 7), 190.

## 2. The Current CARICOM Claim

In July 2013, the CARICOM Conference of Heads of Government mandated the establishment of the CARICOM Reparations Commission (CRC) as well as national committees on reparations.<sup>18</sup> The purpose of those commissions and committees is “to pursue reparations from the former European colonial powers for Native Genocide, the Trans-Atlantic Slave Trade and Slavery”.<sup>19</sup> Following the CARICOM mandate, the CRC was formally established in September 2013. National reparations committees have been established by twelve out of fifteen CARICOM Member States.<sup>20</sup> One of the tasks of the national commissions is to undertake the “preparation of the lawsuit” by gathering historical information pertaining to each claimant State and by outlining modern racial discrimination resulting from slavery in areas of health, socio-economic deprivation and social disadvantage, education, living conditions/housing, property and land ownership, employment, participation in public life and migration.<sup>21</sup>

The primary task of the CRC seems to be the establishment of “the moral, ethical and legal case for the payment of Reparations” and to develop a political and diplomatic strategy to achieve these goals. In 2013, the CRC summarised their reparation claim in a “ten point plan for slavery reparations”.<sup>22</sup> In this document the CRC states that European Governments *inter alia*:

- Were owners and traders of enslaved Africans
- Instructed genocidal actions upon indigenous communities
- Created the legal, financial and fiscal policies necessary for the enslavement of Africans [...]
- Compensated slave owners at emancipation for the loss of legal property rights in enslaved Africans
- Imposed a further one hundred years of racial apartheid upon the emancipated
- Imposed for another one hundred years policies designed to perpetuate suffering upon the emancipated and survivors of genocide

<sup>18</sup> See Communiqué Issued at the Conclusion of the Thirty-Fourth Regular Meeting of the Conference of Heads of Government of the Caribbean Community, 3.-6.7.2013, Port of Spain, Trinidad and Tobago, available at <<http://www.caricom.org>>.

<sup>19</sup> CARICOM Secretariat, News Feature 10/2014, 15.10.2014, available at <<http://www.caricom.org>>.

<sup>20</sup> CARICOM Secretariat (note 19).

<sup>21</sup> Press statement by *Fred Mitchell*, Bahamas Minister of Foreign Affairs and Immigration, made on 24.3.2014, available at <<http://www.thebahamasweekly.com>>.

<sup>22</sup> Available at <<https://www.leighday.co.uk>>.

- And have refused to acknowledge such crimes or to compensate victims and their descendants

Remedies sought by CARICOM include a full formal apology from European governments, a repatriation program for ancestors of forcefully migrated enslaved people, an indigenous peoples development program, the establishment of cultural institutions in the Caribbean, such as museums and research centres to further the populations' understanding of slavery and genocide, the participation of European governments in the alleviation of Caribbean public health problems which are regarded as a legacy of slavery, a programme to address illiteracy which also is regarded as a legacy of slavery, an African Knowledge Program (school exchanges, culture tours etc.), psychological rehabilitation through "truth and educational exposure" to begin a "process of healing and repair", technology transfer and a program for international debt cancellation.<sup>23</sup>

As legal advisor, the CARICOM Commission has consulted the British law firm Leigh Day, which has a department for international and group claims and successfully represented several reparations claims for historical injustices before. As reported by Reuters, *Martyn Day*, partner at Leigh Day, announced early in 2014 that a formal complaint would be presented to European governments until the end of April 2014 and that "[t]he complaint will undoubtedly go to the governments of Britain, France, Netherlands, and very likely Sweden, Norway, and Denmark," but also that "[t]he final decision on this has not yet been made". Furthermore, *Day* added that if the complaint is rejected, "CARICOM nations will take their individual cases to the International Court of Justice".<sup>24</sup> As there are no further official statements, it remains unclear whether the formal complaint was presented to European governments in 2014.

The latest news is, that early in 2016, Barbados Prime Minister *Stuart* reportedly sent a formal letter of complaint, on behalf of CARICOM Member States, to the British foreign office, calling the United Kingdom (UK) to acknowledge the region's demands.<sup>25</sup> In this letter, Caribbean countries seem to have allowed the UK a two-year period before they will formally approach the International Court of Justice (ICJ). With regard to other Eu-

<sup>23</sup> See "Ten Point Plan for Slavery Reparations", available at <<https://www.leighday.co.uk>>.

<sup>24</sup> See "Caribbean Nations Agree to Seek Slavery Reparations from Europe", available at <<http://www.reuters.com>>.

<sup>25</sup> Unfortunately, the precise contents of the letter were not released; for some information see "Barbados PM Writes Britain on Reparation on Behalf of CARICOM", 2.3.2016, available at <<http://www.caricom.org>>.

ropean States there are no further official statements or reports that would indicate any legal action. It also appears unclear whether the limitation of defendants by *Day* represents the will of CARICOM States, as their official documents include Spain and Portugal as possible addressees of their claims.<sup>26</sup>

Yet, what is relatively clear is that the threat to approach the ICJ is unfounded substantially, as many European States limited their acceptations of compulsory jurisdiction (Art. 36 para. 2 ICJ-Statute) to certain time periods,<sup>27</sup> or do not accept compulsory jurisdiction at all (France). Only the Netherlands, Denmark, Sweden and Norway remain possible defendants based on compulsory jurisdiction.<sup>28</sup> Still, Caribbean States so far seem to focus on claims against the UK, which are not likely to be pursuable in front of the ICJ.

A further possibility would be to rely on treaty clauses that refer disputes over the interpretation and application of the relevant treaty to the ICJ, e.g. Art. IX Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Art. 10 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Supplementary Slavery Convention), or Art. 22 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), but the Genocide Convention only entered into force in 1951, the Supplementary Slavery Convention in 1957 and ICERD in 1969 and as we will later see none of them is applicable retroactively, which also affects the named jurisdiction clauses.<sup>29</sup>

<sup>26</sup> See CARICOM Reparations Commission Press Statement, Press release 285/2013, 10.12.2013, available at <<http://www.caricom.org>>.

<sup>27</sup> United Kingdom of Great Britain and Northern Ireland, Declaration Recognizing the Jurisdiction of the Court as Compulsory, 31.12.2014, para. 1 (the relevant date is 1.1.1984, and the UK also excludes claims by Commonwealth States); Kingdom of Spain, Declaration Recognizing the Jurisdiction of the Court as Compulsory, 29.10.1990, para. 1 (d) (the relevant date is 15.10.1990).

<sup>28</sup> The Netherlands accept compulsory jurisdiction in all cases “arising” after 5.8.1921, which is broader than e.g. the UK limitation as disputes may arise today although they rely on facts dating back earlier, see Netherlands, Declaration Recognizing the Jurisdiction of the Court as Compulsory, 1.8.1956; Denmark, Sweden and Norway make no temporal limitation in their declarations recognizing the ICJ’s jurisdiction as compulsory.

<sup>29</sup> The ICJ recently denied jurisdiction under Art. XI of the Genocide Convention based on the non-retroactive applicability of the Genocide Convention, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3.2.2015, paras. 90-117.

### III. Legal Evaluation of the CARICOM Claim

CARICOM's strategy to address today's socio-economic problems by recourse to state responsibility for historical injustices ultimately depends on the soundness of their legal arguments. Requirements of such a claim are the violation of a primary rule, attribution, lack of circumstances precluding wrongfulness and invocation of responsibility.<sup>30</sup> Moreover, remedies sought by CARICOM must be addressable by legal consequences available.

#### 1. Violation of (European)<sup>31</sup> International Law

##### a) "Native Genocide" in the Caribbean?

The most comprehensive statement by the CRC on genocide is the following:

"[G]overnments of Europe committed genocide upon the native Caribbean population. Military commanders were given official instructions by their governments to eliminate these communities and to remove those who survive pogroms from the region. Genocide and land appropriation went hand in hand. A community of over 3,000,000 in 1700 has been reduced to less than 30,000 in 2000. Survivors remain traumatized, landless, and are the most marginalized social group within the region."<sup>32</sup>

Although this description is rather short, it contains the two important elements of genocide: the intent to destroy a national, ethnic, racial or religious group and the killing of members of this group.<sup>33</sup> Surprisingly, the

<sup>30</sup> In the analysis, I will largely rely on the ILC's Draft Articles on State Responsibility (ARSIWA) which reflect customary international law in large parts.

<sup>31</sup> Some may question the methodology of applying historical European international law on the conduct between European and non-European entities, the latter of which were not included in the law-making process. Yet, as international law is based on consent of those to be bound by it, one must necessarily apply the law European States consented to. This is not meant to legitimize slavery and other grave injustices, but instead highlights historical (European) international laws limits and moral failures. Furthermore, it is highly questionable whether other "international laws" prohibited the conduct in question here, see *J. Allain, Slavery in International Law: Of Human Exploitation and Trafficking*, 2013, 17 et seq.; for a critical perspective on those assumptions, see *N. Wittmann, International Legal Responsibility and Reparations for Transatlantic Slavery*, in: F. Brennan/J. Packer (eds.), *Colonialism, Slavery, Reparations and Trade: Remediating the Past?*, 2012.

<sup>32</sup> See "Ten point plan for slavery reparations" (note 23).

<sup>33</sup> See on the definition of genocide: Art. 2 Genocide Convention; Art. 2 para. 2 ICTY Statute; Art. 2 para. 2 ICTR Statute, Art. 6 ICC Statute.

early encounter between Spaniards and native people of the Caribbean in the late 15<sup>th</sup> and early 16<sup>th</sup> century is not included, although it reportedly led to the (near) extinction of the native Taino people.<sup>34</sup> This may be due to the fact that neither Haiti nor the Dominican Republic, the States that cover Hispaniola, the island which mainly was home to the Taino people, take part in the CARICOM reparations claim. Furthermore, although it appears that the “Taino tragedy” was “the result of an organised economic venture, planned and executed consciously by its continental planners, who deliberately took the human costs involved into consideration”,<sup>35</sup> the intent to annihilate the Taino people remains debatable, as those people were needed as a work force<sup>36</sup> and often died of unintentionally introduced diseases (at least there are no reports of “biological warfare”).

Further reported incidents that could qualify as genocide mainly involve British conduct towards native Caribbean populations (mainly Kalinago communities).<sup>37</sup> *Beckles* recounts several massacres against those communities and several statements which indicate that English and later British<sup>38</sup> authorities wanted to extinguish the Kalinagos and at several occasions killed non-combatant children, women and elderly people. The number of reported casualties in the individual cases remains rather limited, generally not exceeding 100.<sup>39</sup> Reproduced statements mainly consist of letters by English, later British, military officers and colonial government officials who requested permission by the English/British government to extinct the

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<sup>34</sup> While the total number of Taino living on Hispaniola in 1493 seems disputed, ranging from hundreds of thousands to millions, it is quite clear that most Taino died early of diseases imported by, were murdered by or died because of the harsh working conditions imposed upon them by the Spanish, see C. Gibson, *Empire's Crossroads: A History of the Caribbean from Columbus to the Present Day*, 2014, 35; other estimates range from 1-3.7 million, see N. Foote, *The Caribbean History Reader*, 2013, 18.

<sup>35</sup> J. Sued-Badillo, *From Tainos to Africans in the Caribbean: Labor, Migration, and Resistance*, in: S. Palmié/F. A. Scarano (eds.), *The Caribbean: A History of the Region and Its Peoples*, 2011, 106.

<sup>36</sup> See on the *encomiando* system which provided some (superficial) protection for the native population: I. Czeguhn, *Sklavereigesetzgebung im Spanien der frühen Neuzeit sowie in den ersten Jahrzehnten der Kolonisierung Amerikas*, in: U. Müssig, *Ungerechtes Recht*, 2013, 114.

<sup>37</sup> This does not mean that there has not been any conduct that may be termed genocide by other European States. The simple fact is that *Beckles* and the CRC somehow seem to focus on the UK and the sheer numbers in the decline of Native Caribbean upon contact with the Spanish is so high that I could not omit it.

<sup>38</sup> Great Britain was only formed in 1707 with the political union of the kingdoms of England and Scotland.

<sup>39</sup> See H. Beckles (note 11), 24 et seq.; in some cases numbers of casualties are of course debatable, ranging from dozens to several thousands, see for example: B. Dyde, *Out of the Crowded Vagueness: A History of the Islands of St Kitts, Nevis & Anguilla*, 2005, 26 et seq.

“Carib Indians” (their name for the Kalinagos). One of those letters by *Sir William Stapleton*, governor of the Leeward Islands, dates back to 1681 and one by governor *Leyborne* of Dominica to 1772. At least the request of *Stapleton* was reportedly confirmed by imperial officials in London.<sup>40</sup> *Beckles* also reports of several wars and massacres between Karifuna<sup>41</sup> communities and British settlers and military between 1772 and 1795.<sup>42</sup> In 1795, the Karifunas in St. Vincent and St. Lucia were finally defeated. While some Karifunas fled to Dominica, a group of five thousand people is reported to have been captured by the British and shipped to the tiny island of Balliceaux in The Grenadines, where one third of them starved to death in the following four months until they were finally transported to Rattan, an inhospitable small island near Honduras.<sup>43</sup>

The reproduced statements and events show that English/British massacres on Kalinago and Karifuna communities might qualify as genocides. If we assumed that the intention to extinct the Kalinago and Karifuna communities based on racial, ethnic and religious group identity reflects general British intention than most of these massacres, if carried out with the authorisation of the British government, could be seen as fulfilling the definition of genocide described above. But generally, it would be necessary to provide more evidence to prove the necessary intention and individual orders by the British government and/or officials and the linkage between such orders and the individual massacres. This is of particular importance as the ICJ strictly applies the general principle of *actori incumbit probatio* and high standards of proof when it comes to the *mens rea* of genocide.<sup>44</sup>

## b) The Prohibition of Genocide and the Intertemporal Principle

A particular obstacle to reparation claims for historical injustices is the intertemporal principle.<sup>45</sup> Defining the intertemporal principle, internation-

<sup>40</sup> *H. Beckles* (note 11), 25.

<sup>41</sup> The term “Karifuna” refers to “Kalinago” communities that mixed with escaped formerly enslaved Africans.

<sup>42</sup> *H. Beckles* (note 11), 34 et seq.

<sup>43</sup> *H. Beckles* (note 11), 36.

<sup>44</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (note 29), paras. 167-199; for an analysis see *A. Gattini/G. Cortesi*, Some New Evidence on the ICJ’s Treatment of Evidence: The Second Genocide Case, *LJIL* 28 (2015).

<sup>45</sup> The Intertemporal Principle is by now a firmly established norm of international customary and treaty law. The principle is codified in Art. 28 Vienna Convention on the Law of Treaties (VCLT), and has been addressed in Art. 13 ARSIWA; see generally: *W.-D. Krause-*

al lawyers usually refer to the statement of Judge *Huber* in *The Island of Palmas* case, that

“juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled”.<sup>46</sup>

The principle is codified with regard to treaty law in Art. 28 of the Vienna Convention on the Law of Treaties (VCLT), is addressed in Art. 13 Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and has been restated by the ICJ.<sup>47</sup> As the intertemporal principle prohibits the retroactive application of international law, the question of legality has to be answered by referring to the law in force of the time of the conduct. Therefore, even if the required evidence for genocide could be produced, it remains questionable whether genocide has already been prohibited by international law at the time of its conduct in the Caribbean.

Although the factual appearance of genocide can be traced back at least to ancient times, its prohibition by international law appears to be a phenomenon of the early 20<sup>th</sup> century. The term “genocide” itself was coined by *Raphaël Lemkin* in his work *Axis Rule in Occupied Europe*<sup>48</sup> only in 1944. The Convention on the Prevention and Punishment of Genocide was then adopted in 1948 and entered into force in 1951. Today, the prohibition of genocide is also part of international customary law.<sup>49</sup>

Notwithstanding its quite recent naming and codification, some writers have argued that genocide was prohibited by customary international law earlier under different names.<sup>50</sup> Such names could be “wars of extinction” or generally “crimes against humanity”. Some of those writers even claim

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*Ablaß*, Intertemporales Völkerrecht: Der zeitliche Anwendungsbereich von Völkerrechtsnormen, 1970 and *T. O. Elias*, The Doctrine of Intertemporal Law, *American Journal of International Law* 74 (1980).

<sup>46</sup> See *The Island of Palmas (United States of America v. The Netherlands)*, 4.4.1928, Permanent Court of Arbitration, UNRIIAA, Vol. II, 845.

<sup>47</sup> See e.g. *Jurisdictional Immunities of the State*, ICJ Reports 2012, 29.

<sup>48</sup> *R. Lemkin*, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, 2<sup>nd</sup> ed. 2008.

<sup>49</sup> See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Further Requests for the Indication of Provisional Measures, ICJ Reports 1993, 325; *A. Cassese*, *International Criminal Law*, 2008, 98.

<sup>50</sup> *J. Sarkin*, Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908, 2009, 11, 107 et seq.; in a similar direction: *M. J. Kelly*, Can Sovereigns Be Brought to Justice? The Crime of Genocide’s Evolution and the Meaning of the Milosevic Trial, *St. John’s L. Rev.* 76 (2002), 264 et seq.

that the concept of genocide “dates back thousands of years”.<sup>51</sup> Consulting contemporary writers of the time in which alleged “genocides” happened in the Caribbean, we already read of certain limitations to warfare and especially to the treatment of prisoners of war.<sup>52</sup> *Vitoria* already seems to be of the opinion that even a just war must not be waged towards the extinction of a people.<sup>53</sup> *Grotius* writing in 1625, although not directly addressing the concept of genocide, limited the legality of invoking a war<sup>54</sup> and also warfare itself<sup>55</sup> to certain limitations. *Vattel* writing in 1758 excludes women, children, the aged and sick from being legitimate targets of warfare as long as they offer no resistance.<sup>56</sup> Yet, early international law scholars at the same time were often creative in excluding non-European entities and people from the realms of international law or at least seriously limited their rights, although often with obscure justifications.<sup>57</sup> Furthermore, it appears questionable from a modern and more positivist view whether the writings of the early natural/international lawyers reflected substantial international law at all.

Due to these uncertainties, one has to doubt whether genocide, in particular towards “natives”, even under different names, was outlawed by international law before the 20<sup>th</sup> century. Instead, most of today’s legal scholars and States seem to be of the opinion that genocide was only outlawed by customary law in the early 20<sup>th</sup> century, long after most “native genocides” were conducted by Europeans in the Caribbean.<sup>58</sup> This is demonstrable by the controversies surrounding the Armenian “Genocide” (1915-1916)<sup>59</sup> and

<sup>51</sup> *J. Sarkin* (note 50), 11, 107 et seq.

<sup>52</sup> *F. de Vitoria*, *De indis et De jure belli relectiones*, 1539, paras. 45-48, in: E. Nys (ed.), *Classics of International Law*, 1995, 182 et seq.

<sup>53</sup> *F. de Vitoria* (note 52), 187.

<sup>54</sup> *H. Grotius*, *De jure belli ac pacis libri tres*, 1646, bk II, ch 1, in: F. W. Kelsey (transl.), *Classics of International Law*, 1925, 169 et seq.

<sup>55</sup> *H. Grotius* (note 54), bk III, especially ch 1 and chs 11-14.

<sup>56</sup> *E. de Vattel*, *The Law of Nations or the Principles of Natural Law*, bk III, ch 8, § 144, in: C. G. Fenwick (transl.), *Classics of International Law*, 1995, 362.

<sup>57</sup> *Vitoria* for example argued with regard to the question if all the “guilty” could be killed in a war, that this may be necessary in the case of “Indians” because it is useless to hope for a just peace with them; see for quotes and a discussion of *Vitoria*’s stance on the sovereignty and rights of “Indians”: *A. Anghie* (note 8), 27.

<sup>58</sup> See *R. W. Smith*, *State Power and Genocidal Intent: On the Uses of Genocide in the Twentieth Century*, in: L. Chorbajian/G. Shirinian (eds.), *Studies in Comparative Genocide*, 1999, 9 et seq.; *W. Schabas*, *Genocide in International Law: The Crimes of Crimes*, 2000, 1 et seq., 11; *J. A. Kämmerer/J. Föh*, *Das Völkerrecht als Instrument der Wiedergutmachung? Eine kritische Betrachtung am Beispiel des Herero-Aufstandes*, AVR 42 (2004), 316.

<sup>59</sup> Albeit the factual qualification as genocide in this case is rather clear, the legal qualification is disputed, see *M. Roscini*, *Establishing State Responsibility for Historical Injustices: The Armenian Case*, IntCrimLRev 14 (2014), 316, who concludes, that the “genocide” on the

the “Genocide” on the Herero and Nama (1904-1908)<sup>60</sup>. It has to be noted that rather recently both of these “genocides” have been termed as such by several States (including Germany with regard to the Herero) and international Organisations.<sup>61</sup> Still, at least in the *Herero* case, the German government also highlighted that the term was used in a historical non-legal sense and therefore could not entail any legal consequences.<sup>62</sup> Albeit some States appear more willing to accept historical guilt in the last years, it remains to be seen whether legal consequences will also become accepted.

### c) Slavery in the Caribbean and the Intertemporal Principle

Slavery in and the slave trade to the Caribbean took place between the 16<sup>th</sup> and the 19<sup>th</sup> century and was carried out by a number of European powers, mainly including the Spanish, the Portuguese, the English, the French and the Dutch. Estimates of Africans sold into the Transatlantic Slave Trade range from 9.6 to 15 million.<sup>63</sup> The CRC claims that “[o]ver 10 million Africans were imported into the Caribbean during the 400 years of slavery” and that only 2 million remained in the late 19<sup>th</sup> century, when slavery was finally abolished.<sup>64</sup>

Again, the intertemporal principle might impede reparatory claims for slavery. Today, the prohibition of slavery is regarded as a *ius cogens* norm

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Armenians was not prohibited by international customary law but rather deems it in breach of several specific treaties the Ottoman Empire had ratified.

<sup>60</sup> Several German scholars concluded that the German massacres on the Herero and Nama were not prohibited by international law at the respective time, see *J. A. Kämmerer/J. Föh* (note 58), 315 et seq.; *S. Eicker*, *Der Deutsch-Herero-Krieg und das Völkerrecht: Die völkerrechtliche Haftung der Bundesrepublik Deutschland für das Vorgehen des Deutschen Reiches gegen die Herero in Deutsch-Südwestafrika im Jahre 1904 und ihre Durchsetzung vor einem nationalen Gericht*, 2009, 501.

<sup>61</sup> See on the (non-legal) recognition of the “Herero Genocide” by the German Government: BT-Drs. 18/9152: Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten *Niema Movassat, Wolfgang Gehrcke, Christine Buchholz*, weiterer Abgeordneter und der Fraktion DIE LINKE, Sachstand der Verhandlungen zum Versöhnungsprozess mit Namibia und zur Aufarbeitung des Völkermordes an den Herero und Nama; see on the recognition of the Armenian Genocide by the German Bundestag: BT-Drs. 18/8613, 31.5.2016, Antrag der Fraktionen CDU/CSU, SPD und BÜNDNIS 90/DIE GRÜNEN, Erinnerung und Gedenken an den Völkermord an den Armeniern und anderen christlichen Minderheiten in den Jahren 1915 und 1916; see on the recognition of the Armenian Genocide by the Council of Europe: Council of Europe, Parliamentary Assembly, Recognition of the Armenian Genocide, Written Declaration 320, Doc. 9056, 2<sup>nd</sup> ed., 14.5.2001.

<sup>62</sup> BT-Drs. 18/9152 (note 61), 3.

<sup>63</sup> *H. Beckles* (note 11), 50.

<sup>64</sup> See “Ten point plan for slavery reparations” (note 23).

which is applicable *erga omnes*.<sup>65</sup> However, until the late 19<sup>th</sup> century the situation was quite different. Albeit it appears as uncontested that slavery and slave trade in the Caribbean would fulfil the criteria of modern slavery prohibitions, it is rather clear that at the time of their conduct those institutions were not prohibited by (European) international law.

Despite the fact that slavery of Europeans/Christians among themselves appears to have been regarded as illegal under the law of nations much earlier,<sup>66</sup> the idea to prohibit slavery and the slave trade of Africans only came on the agenda of European States in the late 18<sup>th</sup> and early 19<sup>th</sup> century. In fact, the Western notion of who could be enslaved changed from “universality to limiting enslavement to non-Christians, then non-Europeans, then just to Africans, and finally to the international prohibition of all enslavement”.<sup>67</sup>

The general attitude that slavery and slave trade were in accordance with the law of nations until the late 19<sup>th</sup> century was also approved by several judgements of British and US courts. In 1817, the British High Court of Admiralty recognised in *Le Louis* that although the slave trade violated English law, it did not violate international law.<sup>68</sup> In *The Antelope*, US Chief Justice *John Marshall* deemed slave trade in violation of American law and the law of nature but “consistent with the law of nations”.<sup>69</sup>

Only in the early 19<sup>th</sup> century, European States began to sign treaties and issue declarations regarding the abolition of first slave trade and later slavery itself. The 1815 Declaration Relative to the Universal Abolition of the Slave Trade,<sup>70</sup> signed at the Congress of Vienna, was the first international instrument which dealt specifically with slave trade.<sup>71</sup> The declaration recognised that slave trade was “repugnant to the principles of humanity and universal morality” but did not require States to outlaw slave trade immedi-

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<sup>65</sup> *Barcelona Traction, Light and Power Company, Limited*, ICJ Reports 1970, 32; *I. Brownlie*, Principles of Public International Law, 7<sup>th</sup> ed. 2008, 511.

<sup>66</sup> See *F de Vitoria* (note 52), para. 42, 181; *H. Grotius* (note 54), 696; *E. de Vattel* (note 56), bk III, ch VIII, § 152, 286; see also: *The Antelope*, 23 U.S. (10 Wheat.) 5, 121 (1825).

<sup>67</sup> *S. Drescher/P. Finkelman*, Slavery, in: B. Fassbender/A. Peters (eds.), *The Oxford Handbook of the History of International Law*, 2012, 893.

<sup>68</sup> *Le Louis* (1817) 12 Dods 210, 165 ER 1464, 1477.

<sup>69</sup> *The Antelope* (note 66), 66.

<sup>70</sup> Declaration of the Eight Powers relative to the Universal Abolition of Slave Trade, annexed as Act XV to the 1815 General Treaty of the Vienna Congress (signed 8.2.1815), 63 CTS 473.

<sup>71</sup> *J. A. Fernández*, *Hostes humani generis: Pirates, Slavers, and Other Criminals*, in: B. Fassbender/A. Peters (note 67), 131.

ately.<sup>72</sup> After some other rather vague multilateral treaties, the Treaty for the Suppression of the African Slave Trade (1841)<sup>73</sup> deemed the slave trade equal to piracy and enshrined duties to prohibit, prevent, and punish slave traders.<sup>74</sup> The General Acts of Berlin (1885) included the Declaration Concerning the Slave Trade and the Operations Which on Land or Sea Furnish Slaves to Trade which recognised that slave trade was prohibited by “the principles of the law of nations”.<sup>75</sup> The first comprehensive multilateral treaty directed against the African slave trade was the Brussels Act of 1890.<sup>76,77</sup> Further treaties concerning slave trade were concluded in 1904, 1910, 1921 and 1933.<sup>78</sup> In 1926, the important Slavery Convention was signed.<sup>79</sup> This convention obliged States “to prevent and suppress the slave trade” but only “to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms”<sup>80</sup>. Moreover, Art. 9 of the Slavery Convention allowed contracting parties to declare the Convention non-applicable to their colonial territories.

Although the treaties continued to be vague, scholars claim that slavery and slave trade were subsequently outlawed by international customary law. Related to the nature of customary law, a precise year of the prohibition is difficult to ascertain. It can only be broadly assumed that both institutions were outlawed somewhere between 1885 and 1926 by customary international law.<sup>81</sup> For the purposes of this paper, the exact time can of course re-

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<sup>72</sup> The declaration instead stated that “the said Plenipotentiaries at the same time acknowledge that this general Declaration cannot prejudge the period that each particular Power may consider as most advisable for the definitive Abolition of the Slave Trade. Consequently, determining the period when this trade is to cease universally, must be a subject of negotiation between the Powers”, see Final Act of the Congress of Vienna, Act XV, Declaration of the Powers, on the Abolition of the Slave Trade, 8.2.1815.

<sup>73</sup> Treaty for the Suppression of the African Slave-Trade (signed 20.12.1841), 73 CTS 32.

<sup>74</sup> Treaty for the Suppression of the African Slave-Trade (note 73), 132.

<sup>75</sup> See General Act of the Conference of Berlin Concerning the Congo, American Journal of International Law Supplement: Official Documents 7-25, (1909), Art. 9.

<sup>76</sup> General Act of the Brussels Conference (signed 2.7.1890), 173 CTS 293.

<sup>77</sup> S. Drescher/P. Finkelman (note 67), 910.

<sup>78</sup> J. A. Fernández (note 71), 133 et seq.

<sup>79</sup> Convention to Suppress the Slave Trade and Slavery (concluded 25.9.1926, entered into force 9.3.1927), 60 LNTS 253.

<sup>80</sup> International Convention for the Abolition of Slavery and the Slave Trade (signed 25.9.1926, entered into force 9.3.1927), 60 LNTS 253.

<sup>81</sup> G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 4<sup>th</sup> ed. 2012, 209; S. Drescher/P. Finkelman (note 67), 891, argue that both institutions were outlawed in 1890.

main open, since the relevant countries had already outlawed slavery and slave trade nationally before 1885.<sup>82</sup>

Yet, one question that has only been seldomly addressed so far is, whether there were any legal preconditions by international law regarding the enslavement. Interestingly, contemporary legal scholars sanctioned slavery but did not regard it as unregulated, instead required certain preconditions.<sup>83</sup> Mostly their accounts were based on the Roman *ius gentium* requirement that only prisoners of war could be enslaved, as imposing slavery on them was regarded as an act of mercy in comparison to being killed instantly.<sup>84</sup> *Vattel* even required the war to be just and the enslaved to be guilty of some crime punishable by death.<sup>85</sup> If we would follow those scholars, one strategy for Caribbean States could be to claim that the enslavement of Africans did not fulfil those preconditions, as it appears questionable whether all enslaved Africans and Native Caribbean were actually captured in wars, let alone just wars. In fact, historians suggest that most of the enslaved Africans were captured by other Africans in wars but a considerable proportion also were criminal offenders, the victims of abductions and dependants.<sup>86</sup> It also remains questionable whether such wars, which were often fought for the sole purpose of acquiring slaves, can be considered as “just”, even according to the standards of the time. Still, such an argument is complicate to uphold, as it would require a proper understanding of the precise provisions of international law over several centuries and equally precise accounts of the concrete circumstances of the acts of enslavement. Moreover, this way of argumentation would have to deal with centuries of juridical scholarship that was often creative in legitimising slavery “beyond the line” (outside

<sup>82</sup> Slave Trade: Denmark (1804), Britain (1807), Holland (1814), France (1818), Spain (1820); Slavery: UK (1838), France (1848), Portugal (1858), The Netherlands (1863), Spain (1870); see *D. S. Berry*, *The Caribbean*, in: B. Fassbender/A. Peters (note 67), 591 et seq.

<sup>83</sup> See for example: *F. de Vitoria* (note 52), para. 42, 181; *H. Grotius* (note 54), bk III, ch 7 and 14; *C. Wolf*, *Jus gentium methodo scientifica pertractatum*, 1764, §814 and § 874, in: J. H. Drake (transl.), *Classics of International Law*, 1995, 421 et seq. and 448 et seq.; *Vitoria* and *Grotius* had of course very far understandings of who could be enslaved, with only minor restrictions.

<sup>84</sup> See *H. Grotius* (note 54), bk III, ch 7, V; In a similar direction although more critical: *E. de Vattel* (note 56), bk III, ch 3, § 152; see generally on the history of slavery and the law of nations: *J. Allain* (note 31), 12 et seq.

<sup>85</sup> *E. de Vattel* (note 56), bk III, ch 3, § 152 and § 183; similar restrictions were put forward by: *C. Wolf* (note *Jus gentium methodo scientifica pertractatum* (1764), § 814, in: *J. H. Drake* (transl.) (note 83), 421 et seq.

<sup>86</sup> *F. W. Knight*, *The Disintegration of the Caribbean Slave Systems, 1772-1886*, in: F. W. Knight/J. Sued Badillo/K. O. Laurence/J. Ibarra/B. Brereton/B. W. Higman, *General History of the Caribbean*, Vol. III, 1997, 20 et seq.

Europe) or of non-European people<sup>87</sup> and/or did not recognise the sovereignty of non-European political entities at all.<sup>88</sup>

#### d) Historical Injustices as Continuing Acts?

One strategy to circumvent the intertemporal principle could be to argue that the violation, which was not illegal at its beginnings, continues and consequently can be considered as a violation of international law today. The CRC for example speaks of “persistent harm and suffering experienced today” and stresses direct negative results of slavery on the health condition of descendants of those enslaved.<sup>89</sup>

Within the ARSIWA, Art. 14 covers the continuation of a wrongful act. According to that provision, an act of a State occurs when it is performed, “even if its effects continue” (Art. 14 para. 1 ARSIWA). Therefore, continuing effects do not per se lead to the assumption that the illegal act itself continues.<sup>90</sup> The other way round it appears that continuing consequences of a lawful act cannot be regarded as an illegal act itself, even if the initial conduct would be illegal according to new rules in the present. With this distinction in mind, it can hardly be assumed that continuing effects of slavery and genocide are violations of international law themselves. Even if they would be considered as illegal at the time of their conduct, this violation would have ceased with the end of hostilities (genocide)<sup>91</sup>, slavery and slave trade with their abolition.

#### e) Applicability and Exceptions of the Intertemporal Law Principle

##### aa) Applicability

One question that has to be addressed here shortly is whether the Intertemporal Law Principle itself can be applied retroactively. Although the

<sup>87</sup> *Vitoria* for example seemed not to apply his restrictions of slavery to pagan “Indians”, see *A. Anghie* (note 8), 26 et seq.; see generally also: *S. Drescher/P. Finkelman* (note 67), 898.

<sup>88</sup> See generally: *A. Anghie* (note 8).

<sup>89</sup> See “Ten point plan for slavery reparations” (note 23).

<sup>90</sup> ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, ILCYB, 2001, 60.

<sup>91</sup> See with regard to the Armenian “genocide”, *M. Roscini* (note 59), 300 et seq.

principle was mentioned as early as 1899 by an international arbitral body,<sup>92</sup> it remains questionable when the principle itself was established as a rule of international law. Yet, international courts have so far in several cases applied the principle to facts dating back before 1899, seemingly without regarding this practice as problematic.<sup>93</sup> In defence of this practice, one may argue that States simply agreed upon a new principle that excluded the retroactive application of international law which is not in itself a retroactive application but rather a prohibition of such practice in the future or present. In other words, the application of the intertemporal principle does not retroactively affect the legality of acts but rather impacts upon today's legal relations.<sup>94</sup>

#### bb) Exceptions

One exception to the inter-temporal principle could be provided for *jus cogens* norms, as those norms have a special authority in international law and most if not all of them are also crimes against humanity. Nevertheless, the International Law Commission (ILC) made it clear in its commentary that even peremptory norms are not retroactively applicable per se.<sup>95</sup> The same approach was taken in Art. 71 para. 2 (b) VCLT. Therefore, it appears that the intertemporal principle does not generally exempt *ius cogens* norms.

However, some authors seem to suggest that there are exceptions from the intertemporal principle provided by customary law.<sup>96</sup> To support their argumentation, they draw heavily on the Nuremberg and its following criminal trials and claim that those courts applied international law retroactively.<sup>97</sup> Albeit appealing on first sight, it must be critically noted that those trials dealt with individual criminal responsibility not (inter-)State responsibility.<sup>98</sup> Moreover, it is not the case that the International Military Tribunal (IMT) in Nuremberg clearly applied international legal prohibitions retroactively. While the prohibition of war crimes was reasonably established

<sup>92</sup> *Délimitation de la Guyane anglaise* (Grande-Bretagne, Vénézuela) (Judgment of 3.10.1899), cited in: M. Kotzur, Intertemporal Law, in: R. Wolfrum, MPEPIL (2008), <opil.ouplaw.com>, margin number 5.

<sup>93</sup> See for example: *The Island of Palmas (United States of America v. The Netherlands)* (note 46), 845.

<sup>94</sup> See on this distinction: W.-D. Krause-Ablaß (note 45), 25 et seq.

<sup>95</sup> ILC (note 90), 58.

<sup>96</sup> H. Beckles (note 11), 170; A. R. Hippolyte, Unearthing the Legitimacy of CARICOM's Reparations Bid, 2014, available at <<http://www.academia.edu>>, 21 et seq.

<sup>97</sup> H. Beckles (note 11), 170; A. R. Hippolyte (note 96), 21 et seq.

<sup>98</sup> See also: M. Roscini (note 59), 298 et seq., who states that "[b]oth the Nuremberg and Eichmann cases, however, are criminal trials and do not deal with state responsibility".

and crimes against humanity could be based on general principles of international (humanitarian) law, only the prohibition of aggression was really controversial.<sup>99</sup> Yet, even in the case of aggression not the inter-State prohibition itself, which could arguably be based on the *Kellogg-Briand* Pact of 1928,<sup>100</sup> attracted controversies, but individual criminal responsibility for such a crime (also termed “crimes against peace”).<sup>101</sup>

Hence, the claim that Nuremberg and the following trials established a customary exception from the intertemporal principle for some prohibitions/crimes is far from uncontested.<sup>102</sup> With regard to State responsibility, such an exception cannot be assumed. As described above, the ILC’s ARSIWA, which can be considered as authoritative of customary law in many respects, do not provide for such an exemption.

Still, what remains legally possible is that a peremptory or even a non-peremptory norm may be explicitly made retroactively applicable by State practice, treaty provisions or other source of international law.<sup>103</sup> Naturally within a consent based international law system it remains to the will of States to apply certain laws retroactively with regard to matters between the consenting States. Art. 28 VCLT leaves this possibility explicitly open and the ILC’s Commentary on Art. 13 ARSIWA regards such an explicit retroactive applicability as some form of *lex specialis* governed and allowed by Art. 55 ARSIWA.<sup>104</sup> As non-retroactive applicability is *lex generalis* and retroactive applicability the exception, the latter must be made explicit in

<sup>99</sup> See e.g.: *S. Jung*, Die Rechtsprobleme der Nürnberger Prozesse dargestellt an Verfahren gegen Friedrich Flick, 1992, 109 et seq.; *B. Simma*, The Impact of Nuremberg and Tokyo: Attempts at a Comparison, in: N. Ando (ed.), Japan and International Law. Past, Present and Future, 1999, 62 et seq.; *C. Tomuschat*, The Legacy of Nuremberg, JICJ 4 (2006), 834; and *C. Burchard*, The Nuremberg Trial and Its Impact on Germany, JICJ 4 (2006), 806 et seq.

<sup>100</sup> See *The Trial of the War Criminals before the International Military Tribunal*, Nuremberg 14 November 1945 – 1 October 1946, Vol. 1 (Nuremberg: IMT, 1947), 220; see also *H. Ehard*, The Nuremberg Trial Against the Major War Criminals and International Law, AJIL 43 (1949), 237.

<sup>101</sup> For a critical perspective see *C. Tomuschat* (note 99), 833; on critical German perceptions in the aftermath of Nuremberg, see *C. Burchard* (note 99), 808 et seq.; for the arguments of the court see *The Trial of the War Criminals before the International Military Tribunal* (note 100), 220 et seq.

<sup>102</sup> Several authors after the Nuremberg Trial even denied the existence of *nulla poena sine lege* as a norm of international law which could have prohibited criminal responsibility, see for example: *S. Glueck*, The Nuremberg Trial and Aggressive War, 1<sup>st</sup> ed. 1946, 438 et seq.; *H. L. Stimson*, Foreign Affairs, January 1947; see generally and with further references: *S. Jung* (note 99), 147 et seq.; The Supreme Court of Israel also denied the named question in 1962, see *Attorney General v. Adolf Eichmann*, ILR 36 (1968), 281.

<sup>103</sup> See ILC (note 90), 58.

<sup>104</sup> See ILC (note 90), 58; see also: *M. Roscini* (note 59), 296.

any norm and has to be considered on a case by case basis and the help of generally accepted methods of interpretation.<sup>105</sup>

Arguments for retroactive applicability of the Genocide Convention could be based on the preamble, which states, “at all periods of history genocide has inflicted great losses on humanity” and some wordings in the UN General Assembly (GA) Resolution indicating that genocides have happened before.<sup>106</sup> Anyhow, it must be noted that the cited statements in the preamble and the GA Resolution do not necessarily imply that the acts before the existence of the convention were considered illegal. Rather, they may simply highlight the historic occurrence of such acts.<sup>107</sup> Accordingly, with regard to the aforementioned need of an explicit exception from the intertemporal principle, the Genocide Convention cannot be considered as retroactively applicable.<sup>108</sup>

Basically, what has been said on the Genocide Convention can be reiterated with regard to the 1926 Slavery Convention, the 1956 Supplemental Slavery Convention and other relevant conventions like the ICERD. Although some writers suggest so,<sup>109</sup> neither of those conventions can be considered as retroactively applicable. The conventions contain standard clauses on their entry into force<sup>110</sup> and nothing in the conventions indicates that its content shall be applied retroactively.

#### f) Teleological Interpretation and the Utilisation of *Radbruch's Formula*?

We could now stop here by letting historical (European) international law be “what it is” and not what it “ought to be”,<sup>111</sup> would there not be cer-

<sup>105</sup> In the *Ambatielos* case the ICJ required a “special clause or any special object necessitating retroactive interpretation”, see *Ambatielos case*, Preliminary objection, ICJ Reports 1952, 40; see in a similar direction: The Intertemporal Problem in International Law, Resolution adopted by the Institut de Droit International at its Wiesbaden Session, AIDI 56 (1975), 537, para. 1.

<sup>106</sup> *M. Roscini* (note 59), 298 et seq.

<sup>107</sup> See *M. Roscini* (note 59), 298 et seq.

<sup>108</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (note 29), paras. 95-100; *J. Sarkin* (note 50), 112 et seq.; *M. Roscini* (note 59), 298 et seq.

<sup>109</sup> *P. M. Muhammad* (note 6), 938 et seq.

<sup>110</sup> See Art. 12 Slavery Convention, Art. 13 Supplemental Slavery Convention and Art. 19 ICERD.

<sup>111</sup> See on that distinction: *H. L. H. Hart*, Positivism and the Separation of Law and Morals, Harv. L. Rev. 71 (1958).

tain unease about the justice of this outcome. As described above,<sup>112</sup> some international lawyers already tried to fix historical international law by creatively interpreting what was allowed and what prohibited but still by relying on positive law doctrines. I consider these approaches problematic, not only because they are legally flawed, but because they obscure the injustice of historical international law. Claiming slavery and genocide to be prohibited by international law when it was clearly not, obscures the line of “what the law is” and “what it ought to be”. Yet, such a result based on a formal or positivistic application of historical law might be denounced as legalistic and simply as unjust.

But would reliance on natural law doctrines lead to a different outcome? A somewhat radical solution to the perceived injustice would be to rely on the assumption that law which is horrendously arbitrary and unjust cannot be regarded as law at all. Such a notion was introduced by *Gustav Radbruch*, German professor of criminal law and legal philosophy, with regard to atrocities committed in and by the Third Reich, in his famous essay “*Statutory Lawlessness and Supra-Statutory Law*” in 1946.<sup>113</sup> The formula has become widely used (although often not explicitly) by German courts<sup>114</sup> and has certainly been one of the most influential ideas within 20<sup>th</sup> century legal philosophy.<sup>115</sup> *Radbruch* basically tried to resolve the conflict between justice and legal certainty<sup>116</sup> by the following formula:

“The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately be-

<sup>112</sup> See III. 1. b).

<sup>113</sup> *G. Radbruch*, *Statutory Lawlessness and Supra-Statutory Law* (1946): Translated by *Bonnie Litschewski Paulson* and *Stanley L. Paulson*, *Oxford J. Legal Stud.* 26 (2006); for the German original, see *G. Radbruch*, *Gesetzliches Unrecht und übergesetzliches Recht*, *Süddeutsche Juristen-Zeitung* 1 (1946).

<sup>114</sup> This includes criminal law cases but also cases of civil law, examples are: BGHSt 2, 173; 2, 234; BGHZ 3, 94; BVerfGE 23, 98, 106 et seq.; BVerfGE 54, 53, 67 et seq.; BVerfGE 95, 96.

<sup>115</sup> The famous jurisprudential debate between *Hart* and *Fuller* for example also was inspired by *Radbruch* and the German courts’ approach to nullify Third Reich laws, see *H. L. Hart* (note 111); *L. L. Fuller*, *Positivism and Fidelity to Law: A Reply to Professor Hart*, *Harv. L. Rev.* 71 (1958).

<sup>116</sup> It has to be noted that *Radbruch* regarded legal certainty as one aspect of justice and therefore regarded the conflict to be an internal conflict within justice itself.

trayed in the issuance of positive law, then the statute is not merely ‘flawed law’, it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.”<sup>117</sup>

If we would apply this formula to international law, we would come to the corollary that international norms which may be considered as unbearably unjust are not considered as international law at all. Slavery and genocide are certainly extremely degrading treatments which fundamentally deny (human) rights of those enslaved or killed. Moreover, as we have seen above, the sanctioning of slavery was not universal. In fact, it mainly affected Africans for several centuries. This legalisation of slavery did not strive for justice and equality but in fact fundamentally negated both. Therefore, applying *Radbruch’s formula* to international law would result in the sanctioning of slavery and genocide by international law being void.<sup>118</sup>

Of course, such a powerful tool as *Radbruch’s formula*, or generally natural law, is not without dangers. As exemplified by early natural/international lawyers, misuse is a great danger. Moreover, the ceaseless changing nature of what is considered to be just might entail serious consequences for legal stability.<sup>119</sup> On the other hand a minimum of morality within positive international law generally improves fidelity to law and thereby the rule of law.<sup>120</sup> Today, of course *ius cogens* and human rights law already provide such minimum standards.

In any event, positivist lawyers and European States might reject the internationalisation of *Radbruch’s formula* and denounce it as “natural law thinking”.<sup>121</sup> To some extent rightly so, as such a (radical) approach could

<sup>117</sup> G. Radbruch (note 113), 7; see on the reception of the formula in Germany: H. Dreier, Gesetzliches Unrecht im NS-Staat?, in: F. Haft/W. Hassemer/U. Neumann/W. Schild/U. Schroth (eds.), Strafgerechtigkeit: Festschrift für Arthur Kaufmann zum 70. Geburtstag, 1993, 57 et seq.; R. Alexy, Mauerschützen: Zum Verhältnis von Recht, Moral und Strafbarkeit, 1993, 3 et seq.; H. Dreier, Gustav Radbruch und die Mauerschützen, JZ 52 (1997), 423, with further references to German court decisions.

<sup>118</sup> The non-allowance of course must be discerned from the prohibition by international law, see *The Case of the S.S. “Lotus”*, Judgment, (1927) PCIJ Series A No. 10, 18; but we might rely on further “natural law thinking” for example on “elementary considerations of humanity” as applied by the ICJ in the *Corfu Channel* case, ICJ Reports 1949, 22; a similar result could be achieved by enlarging the European internal prohibition to external realms.

<sup>119</sup> See W. M. Reisman, *The Quest for World Order and Human Dignity in the Twenty-First Century*, RdC, Collected Courses, Tome/Volume 351 (2012), 84 et seq.

<sup>120</sup> See L. L. Fuller (note 115), 657.

<sup>121</sup> It has to be noted here that early naturalist international lawyers as seen above also sanctioned slavery.

be accused of circumventing the requirements of *ius cogens* law making<sup>122</sup> and has hardly any foundation in positive international law. Studies of Transitional Justice show that the German example of nullifying past unjust law, though not singular in history, is an exception among national approaches to deal with historical injustices<sup>123</sup> and had a particular historical background. Therefore, *Radbruch's formula* cannot be considered as a general principle of law recognised by “civilized nations” (Art. 38 para. 1 c) ICJ Statute). In addition, simply nullifying past international law and introducing new prohibitions involves again the danger of obscuring this law’s injustice.<sup>124</sup> If flagrantly unjust law is simply void, then no change is necessary and any moral criticism is somehow obsolete.

A less radical proposition would be a teleological reduction of the intertemporal principle.<sup>125</sup> Such an approach must not rely on natural law but simply on the interpretation of existing (positive) international law. Although the intertemporal principle is accepted by customary law, it has no precise shape and is open for interpretation.<sup>126</sup> A teleological interpretation of the intertemporal principle could lead us to some exceptions of this principle, just as national jurisdictions know such exceptions.<sup>127</sup> The telos of the intertemporal principle is legal stability and certainty. States should be able to rely on the law governing in their respective time in order to orient their actions and omissions along what is legal and what prohibited.<sup>128</sup> However, it is arguable that States before around 1899 could not rely as much on legal

<sup>122</sup> I have to thank Prof. Dr. *Heike Krieger* and *Julian Kulaga* for highlighting this problem within our debate in the KFG Research Group “The International Rule of Law – Rise or Decline?”.

<sup>123</sup> Similar approaches like that in Germany were taken in some post-soviet countries but many States took different approaches toward historical injustices in times of transition, see generally: *R. G. Teitel*, *Transitional Justice*, 2001.

<sup>124</sup> See *H. L. H. Hart* (note 111), 620.

<sup>125</sup> It is obvious that customary law also needs clarification by way of interpretation. The ICJ dealt with the interpretation of customary law in *North Sea Continental Shelf*, ICJ Reports 1969, 31; see generally: *M. Herdegen*, *Interpretation in International Law*, in: *R. Wolfrum* (note 92), margin number 61.

<sup>126</sup> See *Land and Maritime Boundary between Cameroon and Nigeria*, Judgment, ICJ Reports 2002, 303, (Separate Opinion of Judge *Al-Khasawneh*), 502 et seq.

<sup>127</sup> Several jurisdictions know exceptions to the general prohibition of applying law retroactively. Generally there is a presumption against retroactivity, but this presumption might be defeated in exceptional cases where no trust in legal security was given or in cases where other reasons (for example public good) prevail over the interest in legal security; see with regard to common law jurisdictions: *B. Juratowitch*, *Retroactivity and the Common Law*, 2008 60 et seq., 137; *C. J. G. Sampford*, *Retrospectivity and the Rule of Law*, 2006, 229 et seq.; see for a comparison between German and US law: *G. Kisker*, *Die Rückwirkung von Gesetzen: Eine Untersuchung zum anglo-amerikanischen und deutschen Recht*, 1963.

<sup>128</sup> See *M. Kotzur* (note 92), margin number 14.

stability as States do nowadays with a firmly established intertemporal principle.<sup>129</sup> Moreover, reliance on legal stability may not be legitimate and factually weaker if a rule is openly contested, in transition or fundamentally unjust.<sup>130</sup> Some acts or omissions are so horrendously unjust that no reasonable State, and notably not those States that saw themselves as particularly “civilized”, may rely on their legality. Slavery, slave trade and genocidal actions towards natives were furthermore criticised by contemporaries, courts and at times even by States as morally unjust.<sup>131</sup> As the trust in legal stability of horrendously unjust laws, which were furthermore openly contested and beginning in the 19<sup>th</sup> century in transition, does not deserve legal protection, retroactive application of new rules does not infringe legal certainty in the case at hand. Such an approach would also avoid obscuring the justice of international law, but clearly applies today’s law retrospectively.

What has to be noted is that such an approach circumvents the above found principle that international law must be made retroactively applicable explicitly. In any event, explicit consent by the “perpetrator” States would be the best solution, and given the lack of compulsory jurisdiction of the ICJ (at least with regard to the UK) is factually the only solution.

But might such a rule, even if based on consent, not lead to legal chaos instead of legal certainty? I would deny that, as the intertemporal principle remains the general rule with only minor exceptions (for example for *ius cogens* norms). Albeit some might fear the opening of the Pandora’s Box and oppose creating precedents, which might lead to numerous claims from all over the (post-colonial) world, we will later see that the secondary rules and especially the question of invocation of responsibility further delimit such claims.<sup>132</sup>

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<sup>129</sup> See above: C. I. 5. a).

<sup>130</sup> See *D. Shelton*, Reparations for Indigenous Peoples: The Present Value of Past Wrongs, in: F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives*, 2008, 69.

<sup>131</sup> See above C. 3. for examples of court decisions and international contracts; Among the contemporaries *de las Casas* is well-known for his critical stance on the Spanish conduct towards Native Caribbean. In his writings he described the killing of “twelve million” native people (men, women and children) between 1502-1542 as “tyrannically and unjustly”, see *B. de las Casas/F. W. Knight* (eds.), *An Account, Much Abbreviated, of the Destruction of the Indies, With Related Texts*, 2003, 7.

<sup>132</sup> Several studies on historical injustices fear that without the intertemporal principle legal claims might go back too far, leading to ceaseless claims, see for example: *J. A. Kämmeler/J. Föh* (note 58), 327.

## 2. The Secondary Rules

Even if States would agree or a court would find that prohibitions of genocide, slavery and slave trade should be applied retroactively this does not automatically lead to the legal consequence of reparations. Rather, we must apply further the secondary rules of State responsibility, including attribution, circumstances precluding wrongfulness, invocation of responsibility and legal consequences.

### a) Secondary Rules and the Intertemporal Principle

Before elaborating upon secondary rules, two preliminary questions have to be addressed. Is the intertemporal principle applicable also to secondary rules? And if yes were the secondary rules of State responsibility already sufficiently established between the end of the 15<sup>th</sup> and the end of the 18<sup>th</sup> century?

Although often overlooked, beside the primary rules breached also the secondary rules had to be accepted at the time of the conduct. The wording of Art. 13 ARSIWA seems to address only the primary rules affected.<sup>133</sup> Yet, if we recall the statement by Judge *Huber* that “juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled”<sup>134</sup> the answer becomes clearer. It appears only logical that the *telos* (legal certainty) of the intertemporal principle also requires attribution, circumstances precluding wrongfulness and the legal consequences of an illegal act to be appreciated in the light of the law contemporary with the facts. Otherwise States would face unforeseeable consequences or would be liable for acts not attributable or justified at the time of their conduct.<sup>135</sup> Thus, any claim for historical injustices has to rely on the secondary rules of State responsibility in force at the time of the violation of the primary rule. To provide a history of the secondary rules of state responsibility is of course a difficult and lengthy task, which I will not bore the reader with here.<sup>136</sup> I shall only address the most problematic obstacles shortly.

<sup>133</sup> Art. 13 ARSIWA states: “An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”

<sup>134</sup> See *The Island of Palmas (United States of America v. The Netherlands)* (note 46), 845.

<sup>135</sup> With the same result albeit without much discussion: *M. Roscini* (note 59), 308 et seq.

<sup>136</sup> See on the History of State Responsibility e.g.: *I. Brownlie*, *State Responsibility*, 1983, 1 et seq.; *J. A. Hessbruegge*, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, *New York Journal of International Law and Politics* 36

The first problem is that early state practise is rare so we would have to rely on the writings by the early international lawyers.<sup>137</sup> Those lawyers had already identified basic concepts of State responsibility and introduced compensation as a form of reparation<sup>138</sup> but it might be questionable whether their doctrines were already part of customary international law of their time.

What also should be kept in mind is that early concepts of state responsibility in the 17<sup>th</sup> century were in fact systems of individual responsibility of the sovereign (e.g. king or queen) him- or herself.<sup>139</sup> Regarding early historical injustices, it is therefore doubtful whether individual responsibility of kings and princes can be equated with State responsibility. As international lawyers used the notions of State and sovereign often synonymous and in those times States were equated with the sovereign<sup>140</sup> such an assumption is debatable but contentious.

Furthermore, those early concepts of state responsibility often required fault by the sovereign and generally operated with rather narrow conceptions of attribution, which also excluded *ultra vires* acts of State officials.<sup>141</sup> This makes it even more difficult to attribute several massacres, which might be considered as genocides, to the respective State, as sufficient evidence of formal acknowledgement or order by the respective government might be difficult to produce. However, concerning slavery and slave trade, this exclusion does not appear (too) problematic as both acts were constantly confirmed by the respective governments through legislation and other formal acts.<sup>142</sup> Albeit slave trade was often carried out by private companies, European States were highly involved and profited from this trade as

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(2004); C. F. Amerasinghe, *Diplomatic Protection*, 2008, 8 et seq.; B. Sabahi, *Compensation and Restitution in Investor-State Arbitration*, 2011, 7-42.

<sup>137</sup> A notable exception are payments of war reparations of France to Germany after the Franco-Prussian War of 1872. Yet, the example occurred after alleged “genocides” and slavery were abandoned in the Caribbean.

<sup>138</sup> H. Grotius (note 54), bk 2, ch XVII, § I, XIII, XX, XXII, 430 et seq.

<sup>139</sup> J. A. Hessbruegge (note 136), 281.

<sup>140</sup> J. A. Hessbruegge (note 136), 286.

<sup>141</sup> See for example: H. Grotius (note 54), bk II, ch XVII, § XX, 436 et seq.; similar views like that of Grotius were later held by Zouche and Pufendorf, although the later already spoke of States not kings, see J. A. Hessbruegge (note 136), 284 et seq.

<sup>142</sup> Laws established by the individual colonies regulated slavery in the British Colonies. Other States, for example France with its “Code Noir” (1685) centrally set up laws governing slavery in the colonies, see C. Birr, *Sharing In the Plunder, Pitying the Men? Normative Regelungen der Sklaverei im britischen Kolonialreich: Das Beispiel Barbados*, in: U. Müssig (note 36), 117.

private entities were granted charters by their respective governments to trade in enslaved people.<sup>143</sup>

With regard to later historical injustices attribution might be easier. The 18<sup>th</sup> century saw the gradual replacement of the king or queen by the State and the expansion of State responsibility.<sup>144</sup> Especially *Wolf* and his student *Vattel* further developed the concept of State responsibility and even introduced concepts of diplomatic protection.<sup>145</sup> *Wolf*, for example, stated that an act is attributable to the ruler of a State and “consequently [...] to the nation itself” if the ruler ratifies or approves of the act of an individual.<sup>146</sup> *Wolf* is also described as being “the first writer to accept that a state could be responsible for the acts of individuals it employs as its agents without there being the need of fault on behalf of the ruler himself”.<sup>147</sup> Interestingly, *Vattel* argued with regard to the Uzbek nation that a nation is generally responsible for the crimes of its citizens,

“when, by its manners, and by the maxims of its government, it accustoms and authorises its citizens indiscriminately to plunder and maltreat foreigners, to make inroads into the neighbouring countries & c.”<sup>148</sup>

The described conduct seems easily applicable to European Nations granting permissions and generally encouraging private companies, citizens and military commanders to plunder foreign countries (e.g. the Caribbean) and to enslave their population.

19<sup>th</sup> century international lawyers also engaged with limiting the fault requirement and *Hall* enlarged responsibility for acts of administrative officials and naval and military commanders.<sup>149</sup> This could allow us to attribute massacres by those officials, which were not always ordered by government officials and at times were carried out *ultra-vires*, to their respective States.

So, which conclusions can we draw from this short historical analysis for the CARICOM claim? First, any reparatory claim for historical injustices has to perform the difficult task of identifying the secondary rules in force at the time in question. Secondly, some serious limitations of State responsibility in former times have to be kept in mind, especially the non-

<sup>143</sup> See on the involvement of the Spanish crown in the early slave trade: *D. S. Berry* (note 82), 587.

<sup>144</sup> *J. A. Hessbruegge* (note 136), 287 et seq.

<sup>145</sup> See *C. F. Amerasinghe* (note 136), 8.

<sup>146</sup> *C. Wolf* (note 83), § 314.

<sup>147</sup> *J. A. Hessbruegge* (note 136), 289 with reference to *C. Wolf* (note 83), § 314, 160.

<sup>148</sup> *E. de Vattel* (note 56), bk. II, ch. VI, § 78, 137.

<sup>149</sup> *W. E. Hall*, *A Treatise on International Law*, 2<sup>nd</sup> ed. 1884, 193, § 65; for an analysis see *J. A. Hessbruegge* (note 136), 293.

attribution of *ultra-vires* acts and the requirement of fault. However, those limitations mostly affect the attribution of genocide, while slavery and the slave trade are more easily attributable.

## b) Invocation of Responsibility

Even if we would agree that the prohibition of slavery, slave trade and genocide could be applied retroactively and attribution to European States is possible (in large parts), serious further questions appear with regard to invocation of responsibility.<sup>150</sup> As invocation of responsibility usually requires that the obligation violated is owed to the entity that invokes responsibility of the violator, difficult questions with regard to legal subjectivity of former political entities and/or individuals are involved.

### aa) Responsible Party

To pin responsibility on today's States involves "complex questions of State succession, continuity and identity".<sup>151</sup> It has been argued elsewhere that European States of the times of slavery were "mere shadows of today's states".<sup>152</sup> Regarding conduct that happened before the Westphalian peace (1648), it may even be arguable that historical political entities before that time could not be regarded as States in the modern sense at all. Yet, as the modern States emerged gradually between the 12<sup>th</sup> and 16<sup>th</sup> century<sup>153</sup> an in-depth and case by case examination would be needed. Alternatively, it may be arguable that modern States succeeded those former entities concerning obligations regarding State responsibility.<sup>154</sup> In any event, one would have to track the identity or succession of those States during the centuries.

Any such undertaking is faced with the problem that the rules on State succession to international responsibility are undertheorized and to a large

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<sup>150</sup> Unfortunately most legal scholars' accounts of reparations for historical injustices so far seem to have avoided or neglected those questions, see *M. du Plessis* (note 6); *J. Sarkin* (note 50); *M. Roscini* (note 59); *A. R. Hippolyte* (note 96).

<sup>151</sup> *M. du Plessis* (note 6), 632; see generally on state succession to international responsibility: *P. Dumberry*, *State Succession to International Responsibility*, 2007.

<sup>152</sup> *M. du Plessis* (note 6), 632.

<sup>153</sup> *A. Cassese*, *States: Rise and Decline of the Primary Subjects of the International Community*, in: *B. Fassbender/A. Peters* (note 67), 49.

<sup>154</sup> In some cases, European States relied on territorial title going back as far as the Middle Ages, suggesting that they succeeded political entities which acquired that title or that they are identical with those political entities, see *The Minquiers and Ecrehos* case, ICJ Reports 1953, 53 et seq.

extent indeterminate.<sup>155</sup> This of course is irrelevant in cases of State identity, as in such cases a State retains all previous rights and obligations.<sup>156</sup> State identity is neither affected by internal changes like revolutions, nor by military occupation where the occupied State does not cease to exist.<sup>157</sup> Moreover, losses of territory generally do not change the identity of States. Therefore, modern European States (like the UK and France) did not lose their identity with the loss of their former Empires.<sup>158</sup>

Additionally, state practice supports some basic rules on the succession to obligations to repair. The principle of succession to international responsibility is for example applicable in cases of unification and integration of States.<sup>159</sup> Finally, there is an “overwhelming tendency” that denies succession of newly independent States to reparatory obligations of the former colonial power before the date of independence and instead supports the responsibility of the continuing State for its *own* internationally wrongful acts.<sup>160</sup>

#### bb) Injured Parties

The obligations of an internationally responsible State can be owed “to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach”.<sup>161</sup> The ILC further distinguishes invocation of responsibility of a State by an injured State (Art. 42 ARSIWA) and by States others than an injured State (Art. 48 ARSIWA). Art. 42 ARSIWA states that:

“A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that State individually; or
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:
  - (i) specially affects that State; or

<sup>155</sup> See for an excellent exemption of accounts of those rules: *P. Dumberry* (note 151).

<sup>156</sup> *A. Zimmermann*, Continuity of States, in: R. Wolfrum (note 92), margin number 1.

<sup>157</sup> *A. Zimmermann* (note 156), margin number 9-10.

<sup>158</sup> *A. Zimmermann* (note 156), margin number 13.

<sup>159</sup> *P. Dumberry* (note 151), 421.

<sup>160</sup> *P. Dumberry* (note 151), 168 et seq., 205 et seq., with further references and examples of State practice.

<sup>161</sup> Art. 33 para. 1 ARSIWA.

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.”

An injury in that context does not mean any form of damage but rather that the obligation breached was owed to (a) the individual State or the cases of (b).<sup>162</sup> Therefore, to invoke the responsibility of another State having suffered damages from an illegal act is not enough. Rather Caribbean States would have to point out that the prohibition of slavery, the slave trade and genocide was owed to their individual States. Although we rely on a retroactive application of those prohibitions still only those who were protected by the prohibition in question and were hurt by the violation of the obligation are able to invoke responsibility today.

If we consider States as protected by the rules in question we face several obstacles. With regard to the date of the violations of international law it is highly questionable if political entities (tribes, chiefdoms, kingdoms etc.) in Africa or the Caribbean could be regarded as sovereign States and consequently as subjects of international law at all.<sup>163</sup> Indeed, although often by use of creative, ambiguous and inconsistent arguments, European scholars and States excluded those entities purposefully from the realms of international law.<sup>164</sup> But even if we assume that States in Africa were subjects of international law at the time (which is not farfetched because certain kingdoms certainly fulfilled the modern criteria of statehood and were even implicitly accepted at times as sovereigns by contemporary courts<sup>165</sup> and

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<sup>162</sup> ILC (note 90), 118.

<sup>163</sup> *Vitoria* for example did not seem to regard “Indians” to be fully sovereign, see *A. Anghie* (note 8), 13 et seq.; neither did international courts and arbitrators in the past accept the Statehood of Native political entities see *The Island of Palmas (United States of America v. The Netherlands)* (note 46), 858; the ICJ recently denied indigenous rulers in sub-Saharan Africa the status of States, see *Land and Maritime Boundary between Cameroon and Nigeria* (note 126), 404 et seq.; for sound criticism see Separate opinion of Judge *Ranjeva*, 469 et seq.; Dissenting opinion of Judge *Koroma*, 474 et seq. and the Separate opinion of Judge *Al-Khasawneh*, 492 et seq.

<sup>164</sup> See generally on the different strategies to exclude native entities from sovereignty by international lawyers and States: *A. Anghie* (note 8); and the introductions by *M. Craven*, *Colonialism and Domination*, in: B. Fassbender/A. Peters (note 67), and *L. Obregón*, *The Civilized and the Uncivilized*, in: B. Fassbender/A. Peters (note 67).

<sup>165</sup> In the *Antelope* case, Chief Justice *Marshall* implicitly accepted non-European States as subjects of international law, as he suggests that African Nations created some sort of territorial customary law sanctioning enslavement of prisoners of war, see *The Antelope* (note 66), 5, 121; later in the 18<sup>th</sup> century of course scholars argued increasingly to exclude non-European states from the realm of international law as they were regarded as “uncivilised”, see *A. Anghie* (note 8), 54.

scholars),<sup>166</sup> it is difficult to argue that modern African States are either identical with those entities or their successors. In any event, Caribbean States are not identical with or succeeding African States. At the same time it is difficult to imagine that modern Caribbean States are identical with or the successors of (hypothetical) Kalinago or Taino States, as they cover different territories and peoples, have fundamentally changed their internal order, have different historical ties and do not seem to have explicitly proclaimed the will to continue or succeed to the legal personality of indigenous people's States.<sup>167</sup> One could argue that the invocation of the reparation claim itself is an expression of the will to succeed the Kalinago and Taino, yet this still seems a little farfetched given that independent Kalinago and Taino entities ceased to exist such a long time ago.

Thus, even if we would use *Radbruch's formula* and declare the exclusion of non-European States void, the fact that European States destroyed, replaced and ultimately entirely changed non-European political entities seriously limits the possibility of invoking responsibility for past violations of international law by modern Caribbean States and others.

Alternatively, we might argue that the prohibition of slavery was owed to the international community as a whole and today's Caribbean States are specially affected in the sense of Art. 31 (b) (i) ARSIWA. This, of course, would mean to apply the concept of obligations *erga omnes* retrospectively. Moreover, although the expression "including that State" is not added to "the international community as a whole" (see Art. 31 (b) (i) ARSIWA) it appears that exactly this case is meant. Responsibility can only be invoked by States part of that international community at the time of the violation. The same considerations then exclude the possibility to invoke State responsibility as "a State other than an injured State" (Art. 48 ARSIWA) and it has to be noted that the formula that a State may claim "performance of the obligation of reparation [...] in the interest of [...] the beneficiaries of the obligation breached"<sup>168</sup> is a forward-looking provision rather than a clear reflection of customary law even today.<sup>169</sup>

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<sup>166</sup> The early natural lawyers (e.g. *Vattel*) appear to have been more willing to classify native peoples as subjects of international law (or at least as political entities with some rights), while later positivists clearly excluded such entities from statehood based on notions of "otherness", *S. J. Anaya*, *Indigenous Peoples in International Law*, 2<sup>nd</sup> ed. 2004, 22 et seq., 26 et seq.

<sup>167</sup> See on the criteria for state continuity: *A. Zimmermann* (note 156), margin number 15 et seq.

<sup>168</sup> Art. 48 para. 2 b ARSIWA.

<sup>169</sup> ILC (note 90), 127.

A third strategy could be to focus on the individual victims and their descendants as injured parties. Under the law of diplomatic protection any injury to a foreign citizen can be regarded as an injury to the State itself, as “[b]y taking up the case of one of its subjects [...] a State is in reality asserting its own rights”.<sup>170</sup> However, such a strategy has to face several objections and an uncertain factual basis. First of all, victims of slavery and genocide would have to be considered as foreign nationals according to the laws of their times, not as “property” or nationals of European States. For example, if we consider enslaved Africans as “subjects of other kings” (as the Spaniards did)<sup>171</sup> who suffered harm in the then territory of European States, their case would become one of diplomatic protection. Yet, generally a State is only “entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim”.<sup>172</sup> Therefore, it is not enough that those enslaved were foreigners, but they must have been nationals of Caribbean States, which was not the case initially.

There is some support for exceptions of the nationality rule in the case of State succession, disappearance of the State of original nationality and newly independent States.<sup>173</sup> However, such exemptions still require that the person has become a national of the new or succeeding State and the exemption is limited to claims against third States (not the former State of nationality).<sup>174</sup> Thus, exercising diplomatic protection for native people or enslaved Africans who became nationals of European States is excluded. Furthermore, all formerly enslaved people have died, what would require us to allow diplomatic protection for deceased nationals.<sup>175</sup> But even in this case the problem remains that most of the deceased people never became nationals of today’s Caribbean States. Exceptions might only be Haiti and Cuba which became independent nations in 1804 and 1898. Those nations surely included formerly enslaved nationals for whom diplomatic protection might

<sup>170</sup> *The Mavrommatis Palestine Concessions*, Judgment of 30.8.1924, PCIJ, Series A, No. 2, 12.

<sup>171</sup> *D. S. Berry* (note 82), 586.

<sup>172</sup> Art. 5 para. 1, ILC Draft Articles on Diplomatic Protection, ILC, Draft Articles on Diplomatic Protection with commentaries, ILCYB, 2006; on the rule of continuous nationality in diplomatic protection see also: *P. Dumberry* (note 151), 337 et seq. and *C. F. Amerasinghe* (note 136), 96 et seq.

<sup>173</sup> For an in-depth analysis with numerous examples of state practice, see *P. Dumberry* (note 151), 344 et seq.

<sup>174</sup> *P. Dumberry* (note 151), 405 et seq.; see also Art. 5 ILC Draft Articles on Diplomatic Protection (note 172).

<sup>175</sup> Such a rule is questionable and state practice is very limited, see for a further analysis: *P. Dumberry* (note 151), 355.

be exercised (if we would accept that diplomatic protection for deceased nationals is possible and those enslaved were no citizens of the former colonial state), yet most direct victims of slavery and genocide never became nationals of Caribbean States. Thus, the strategy of exercising diplomatic protection directly for victims of slavery is fraught with difficulties.

The constellation would of course change if we could regard descendants of those enslaved and killed as injured victims. However, it appears that those persons “only”, if at all, suffer (indirect) damages but cannot be regarded as directly injured in the sense that their rights have been violated. Human rights courts like the European Court for Human Rights (ECtHR) or the Inter-American Court of Human Rights only accept claims by descendants/relatives of victims of human rights violations on a limited scale. The ECtHR for example has created the construct of the “indirect victim” requiring a close relationship to the direct victim (close family members) and at times also that the “indirect victim” is closely affected by claimed human rights violations.<sup>176</sup> The Inter-American Court of Human Rights in certain cases (extra-judicial executions and forced disappearances) considers as injured parties not only those who were killed or disappeared, but also person’s “next of kin” such as “direct ascendants and descendants, siblings, spouses or permanent companions”.<sup>177</sup> A similar approach is taken by UNGA resolutions, which define victim as a person that “suffered physical or mental harm or economic loss as well as impairment of fundamental rights” and accept that there can be indirect victims such as immediate family members or dependants of the direct victim.<sup>178</sup>

The majority of today’s descendants of direct victims would most probably lack those requirements. It is unlikely that today’s descendants even knew their enslaved ancestors living in the 19<sup>th</sup> century or earlier, excluding a close relationship between those people. And great-great-grandparents can hardly be regarded as immediate or close family members. In conclu-

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<sup>176</sup> K. Rogge, Art. 34, in: K. Pabel/S. Schmahl (eds.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention*, 2015, para. 287; C. Grabenwarter/K. Pabel, *Europäische Menschenrechtskonvention*, 5<sup>th</sup> ed. 2012, § 13, para. 20.

<sup>177</sup> 2001 Rules of Procedure of the Inter-American Court of Human Rights, entered into force on 1.6.2001, approved by the Court at its forty-ninth regular session held 16.-25.11.2000, Art. 2 (16), 23 (1); for further details and an analysis of jurisdiction, see J. M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2003, 235.

<sup>178</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 1-2, adopted by UNGA Resolution 40/34 (29.11.1985); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 8-9, adopted by UNGA Resolution 60/147 (16.12.2005).

sion, as any clear rule allowing the invocation of responsibility by States for injuries to ancestors of their population is missing, Caribbean States seem not to be entitled to invoke the responsibility of European States.

### 3. Statutes of Limitation

A further time limit for historical claims might be set by international statutes of limitation. While there is no limitation period in the law of State responsibility, rights to reparation can be lost through waiver or acquiescence.<sup>179</sup> Acquiescence includes unreasonable delay.<sup>180</sup> Yet, the ICJ has stated in its *Certain Phosphate Lands in Nauru* judgment, that “international law does not lay down any specific time-limit in that regard” and that “[i]t is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible”.<sup>181</sup> With regard to the case at hand it has to be highlighted, that prior to World War II only Haiti, the Dominican Republic and Cuba had become independent States,<sup>182</sup> while most other Caribbean territories only declared independence in the 1960s and 1970s.<sup>183</sup> It further has to be acknowledged that due to political ties and pressures following independence, those States were *de facto* not in a position to make such claims and that the preparation of historical facts, now carried out by the CRC, can take years or even decades. Consequently, claims by those States should not be considered inadmissible but generally acquiescence provides some limitations to historical claims.

### 4. (Hypothetical) Legal Consequences

Forms of reparation for the injury caused by internationally wrongful acts today include restitution, compensation and satisfaction.<sup>184</sup> Requested remedies by Caribbean States do not easily qualify as such, except the apology which qualifies as a form of satisfaction.<sup>185</sup> Albeit some requested rem-

<sup>179</sup> Art. 45 ARSIWA.

<sup>180</sup> ILC (note 90), 122.

<sup>181</sup> *Certain Phosphate Lands in Nauru*, Preliminary Objections, ICJ Reports 1992, 253 et seq.

<sup>182</sup> All three of those States have not joined the reparatory claim yet.

<sup>183</sup> See on the decolonization process in the Caribbean: *N. Foote* (note 34), 285 et seq.

<sup>184</sup> Arts. 34-39 ARSIWA.

<sup>185</sup> See Art. 37 para. 2 ARSIWA.

edies include aspects of restitution, they might be more easily achieved by Caribbean States themselves with money obtained through compensation. Regarding compensation, the demands are a reflection of the damages Caribbean States perceive to have encountered but also a statement of what CARICOM States would do with money obtained. Directly tackling the legacies of historical injustices and trying to improve the lives of the descendants of victims of those crimes must be greeted from a development or socio-economic rights perspective.

What remains questionable in some respect is causality. It appears rather farfetched that all of the socio-economic problems mentioned by CARICOM can be directly linked to historical injustices and it is most likely an impossible task to keep apart the different causes for those problems. Today's Caribbean political elites cannot and should not be freed from their own responsibility for socio-economic problems in their States. Moreover, compensation for historical crimes dating back up to 500 years can hardly be based on definite numbers of victims or other ways of clearly assessing the damage caused.<sup>186</sup>

Yet, the focus on development issues may turn out as politically wise. Tackling today's socio-economic problems might appear more convincingly to European States and to some extent rebuts arguments that money obtained will only enrich elites.<sup>187</sup> The various legal obstacles in mind, Caribbean States can only hope for a settlement with European States involving increased development cooperation.

## IV. Conclusion

The legal foundations of the CARICOM claim are flawed. As the inter-temporal principle not only affects the primary but also the secondary rules, claims must be based entirely on international law governing in the past. International advocates and judges would have to dive deep into the (imperial and colonial) history of international law to adjudicate a claim that compromises alleged violations of international law for a period stretching

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<sup>186</sup> See C. Tomuschat, Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law, in: A. Randelzhofer/C. Tomuschat, State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights, 1999, 23; M. du Plessis (note 6), 648 et seq.

<sup>187</sup> The negative example in that regard are reparations paid or promised to be paid by Italy to Libya under *al-Gadaffi* according to the 2008 Treaty of Friendship, Partnership and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya.

over four centuries. Even if we would accept, based on a teleological interpretation of the intertemporal principle or explicit consent by States involved that the prohibition of slavery, slave trade and genocide should be applied retroactively, further legal limitations remain. The scrutiny has led us to the conclusion that the law of State responsibility does not provide rights to reparations for today's States if they are neither identical nor succeeding past subjects of international law. Neither can Caribbean States invoke the law of diplomatic protection as direct victims have died before they became nationals of modern Caribbean States.

Albeit the CARICOM claim may not succeed, it successfully exposes once again grave injustices of the past. International law not only sanctioned (or at least not prohibited) slavery and genocide outside Europe but also continually disregarded other political entities than European States as sovereign and consequently denied non-European people of any sovereign protection. Those exclusions now continue to haunt the justice of international law, as serious obstacles to reparations rely on exactly those exclusions or are at least follow-up problems of the legitimisation of the usage of force and power by European States through international law. The massive exertion of force by European States in the past onto political communities of what is called today "the Global South" simply destroyed, replaced and ultimately entirely changed those entities in a way that no legal claim is available for today's States.

Whether this result is fair or just from a moral point of view is open to contestation but involves difficult questions of intergenerational justice.<sup>188</sup> From a global distributive justice perspective, the issue of repairing the past becomes a matter of addressing today's distributive inequalities. Notions of benefit from historical injustices (even if the benefit is involuntary) may oblige present day parties morally to compensate victims or their descendants if they are still disadvantaged.<sup>189</sup> These questions remain for (legal) philosophers to be discussed and may influence States to accept such claims voluntarily. International law clearly allows retroactive application of today's international law if State's would consent to do so. In the meanwhile, a valuable step into the direction of an international healing process might be the acknowledgement of past injustices (as exemplified by Germany with regard to the Herero, albeit not without flaws) and open discussions between States and civil stakeholders.

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<sup>188</sup> See on this problem e.g.: R. G. Teitel (note 123), 138 et seq.

<sup>189</sup> D. Butt (note 7), Chapter 4.

What remains for international lawyers to do is to develop a critical consciousness of the past atrocities and the “dynamic of difference”<sup>190</sup> legitimised by and enshrined in international law. International discourse and the law itself are still rich of injustices towards the Global South and its people,<sup>191</sup> obliging international lawyers to keep on the “decolonisation of international law”.<sup>192</sup>

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<sup>190</sup> A. Anghie (note 8), 4.

<sup>191</sup> A. Anghie (note 8), 245 et seq.; see generally perspectives of scholars affiliated with Third World Approaches to International Law (TWAIL), for introductions see B. S. Chimni, Third World Approaches to International Law: A Manifesto, *International Community Law Review* 8 (2006) and J. T. Gathii, TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography, *Trade, Law and Development* 3 (2011).

<sup>192</sup> The term is borrowed from: S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, 2013.